

NTSB Order No. EA-4381

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 18th day of July, 1995

Docket SE-13698

respondent's deviation from an air traffic control clearance.<sup>2</sup> However, he waived the proposed sanction (90-day suspension of respondent's airline transport pilot certificate), in light of respondent's timely filing of a report under the Aviation Safety Reporting Program (ASRP).<sup>3</sup> For the reasons discussed below, respondent's appeal is denied and the initial decision is affirmed.

On February 23, 1993, respondent served as pilot in command of American Airlines Flight 1206 from LaGuardia Airport, New York, to Toronto, Canada. The altitude deviation which gave rise to this case occurred shortly after takeoff from LaGuardia, and resulted in respondent's aircraft ascending from its assigned altitude of 16,000 feet to 16,900 feet when there was another aircraft at 17,000 feet.<sup>4</sup> It is undisputed that the deviation

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<sup>2</sup> **§ 91.123 Compliance with ATC clearances and instructions.**

(a) When an ATC clearance has been obtained, no pilot in command may deviate from that clearance, except in an emergency, unless an amended clearance is obtained. A pilot in command may cancel an IFR flight plan if that pilot is operating in VFR weather conditions outside of positive controlled airspace. If a pilot is uncertain of the meaning of an ATC clearance, the pilot shall immediately request clarification from ATC.

**§ 91.13 Careless or reckless operation.**

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

<sup>3</sup> The Administrator agreed that a waiver of sanction was appropriate. (Tr. 8-9.)

<sup>4</sup> At the time of the deviation, the Japan Air Lines Boeing

occurred because both respondent (who, at the time, was handling radio communications with air traffic control (ATC)), and his First Officer (who was operating the controls of the aircraft), misunderstood an informational traffic advisory, believing it to be a clearance for their aircraft to ascend to 17,000 feet.

The misunderstood transmission, which immediately followed respondent's notification that he had checked on to the New York Air Route Traffic Control frequency, was:

American twelve zero six New York roger stand by for climb a[h] traffic at five o'clock and eight miles northwest bound at one seven thousand a seven forty seven clear of traffic I'll have higher for you

(Exhibit A-3.) Respondent admitted that he completely misunderstood the transmission. He attributed that misunderstanding to the fact that he was busy locating and consulting navigational charts in an effort to understand and comply with what he contends was an overly complicated departure clearance.<sup>5</sup> Based on his (erroneous) belief that he had been cleared to 17,000 feet, respondent entered that altitude into the

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747 was at 17,000 feet, traveling in the same direction as respondent's aircraft approximately two and a half miles, laterally, from respondent's flight path.

<sup>5</sup> Based on information printed on the standard instrument departure plate (Exhibit R-1), respondent was expecting ATC to issue vectors to the GAYEL intersection. Instead, according to respondent, they received a heading of 350 and instructions to reach the GAYEL intersection by intercepting the 320 radial off the Deer Park VOR. In addition, they received a clearance to ascend to 16,000 feet and instructions to contact the New York Center on a different frequency. Although respondent admitted there was nothing improper about this departure clearance, and that he had no trouble complying with it, both he and his first officer claimed that the unexpected navigational instructions caused confusion in the cockpit and increased their workload.

aircraft altitude indicator and, in accordance with American Airlines procedures, pointed to the number until his first officer confirmed that it was correct.

Although respondent and his first officer testified that respondent acknowledged the perceived clearance to 17,000 feet by saying "American 1206 cleared to one seven thousand feet," no such readback can be heard on the ATC tape. (Exhibit A-2.) The only audible response is the click of a microphone, and what sounds like a very short (unintelligible) word or portion of a word.<sup>6</sup> The controller<sup>7</sup> took this as an acknowledgement of the traffic advisory, explaining that pilots often acknowledge such information with just a microphone click or a quick "roger." Both he and the FAA inspector emphasized, however, that a controller would not accept this sort of abbreviated transmission as proper acknowledgement of a clearance, but would seek further verification that the proper information had been received.<sup>8</sup>

Respondent testified at the hearing that he believed the unintelligible utterance on the tape was the beginning of his

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<sup>6</sup> There is no squelch or squeal, which would indicate a "blocked" transmission due to two or more aircraft transmitting at once.

<sup>7</sup> The controller who testified at the hearing was training and supervising the controller who made the transmissions heard on the tape. The senior controller monitored the trainee's performance throughout this incident, and found nothing wrong with his handling of respondent's aircraft.

<sup>8</sup> That some pilots use only clicks or a quick "roger" to acknowledge information from ATC was confirmed by the FAA inspector -- himself an experienced airline transport pilot -- and by respondent's own ATC expert (a former FAA air traffic controller).

readback to ATC. (Tr. 153.) He stated he had "no idea" why the remainder of his purported readback could not be heard on the tape, except to suggest that his "finger could have slipped off the mike button," or "the receiver at the ATC center may not have received it." (Tr. 154-5.) The only explanation respondent's ATC expert could offer was, "there are many things that cause transmissions not to be heard. . .[t]he radio not working properly, the mike not working properly, or whatever." (Tr. 208.) There was no evidence, however, of an equipment malfunction.

In any event, that respondent thought he was cleared to 17,000 feet is evident from his response to ATC upon being asked to "verify" his 16,000-foot clearance ("Negative cleared to one seven thousand"), and upon being told by ATC that he had earlier been given traffic at 17,000 feet but was assigned to 16,000 feet ("OK I think I read back one seven thousand to [you] but we were both setting altimeter setting here<sup>9</sup> so a one of us might have guess all read it back wrong"). (Exhibit A-3.)

Despite respondent's arguments that the advisory was confusing because it contained certain terms (e.g., "climb" and "clear of traffic") appropriate only for clearances, the law judge found that the traffic advisory was "clear and unambiguous." He concluded that the misunderstanding occurred only because respondent and his first officer were "wholly

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<sup>9</sup> Respondent explained that his statement about setting the "altimeter" actually referred to setting the altitude alerter.

preoccupied" with their navigational charts. (Tr. 280-81.) He found nothing improper about the advisory, or in the controller's acceptance of a microphone click as an acknowledgement.

Regarding respondent's claim that he acknowledged the perceived clearance with a full readback, the law judge made no direct credibility finding on this point, stating only that it was "unfortunate that . . . if such acknowledgement occurred, that it wasn't received by" ATC. (Tr. 282.) The law judge concluded that respondent's altitude deviation, although inadvertent, resulted in potential danger due to the loss of separation with the other aircraft, and was a violation of the cited regulations.

On appeal, respondent argues that ATC's involvement in this incident was such that, under our case law, he should not be held responsible for the deviation.<sup>10</sup> Specifically, he asserts that

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<sup>10</sup> Respondent relies on Administrator v. Frohmuth and Dworak, NTSB Order No. EA-3818 (1993) (no violation found where ATC failure to separate transmissions to two different aircraft was probably instrumental in pilot's mistake; crew gave a full readback of the misappropriated clearance; and only the controller was in a position to suspect a mistake had occurred); Administrator v. Rolund, NTSB Order No. EA-3991 (1993), aff'd No. 94-1428 (D.C. Cir. 1995) (pilot not strictly liable for failure to hear part of clearance; ATC could have, but did not, clarify pilot's incomplete readback); Administrator v. O'Brien, NTSB Order No. EA-4000 (1993) (no violation where controller admitted that he would have given clearance differently, emphasizing runway change, if he'd known prior controller had led pilot to believe he would be assigned a different runway); and Administrator v. Atkins and Richards, NTSB Order No. EA-4078 (1994) (pilot transmitted full readback of misheard clearance which, if recognized by ATC, would have exposed the error and allowed it to be corrected).

We have also dismissed violations based on substandard ATC conduct in Administrator v. Smith, 3 NTSB 85 (1977) (ATC

ATC issued him an unexpected and allegedly confusing departure clearance, and that the subsequent traffic advisory was both unnecessary, and confusing (because it inappropriately contained the word "climb" in conjunction with an altitude). Thus, according to respondent, ATC was the initiating or principal cause of the misunderstanding which led to the deviation, and under our precedent, no violation is warranted. We disagree.

Even though respondent and his first officer were expecting easily-followed vectors to the GAYEL intersection, there was nothing improper or unduly confusing about the departure clearance they received, which contained somewhat more complicated navigational instructions instead of vectors. Respondent and his first officer essentially acknowledged as much. (Tr. 126, 176, 190-91.) That the crew was required to consult aeronautical charts in order to comply with those instructions does not excuse them from continuing to listen

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instructed pilot to "join" a particular airway which he would have crossed twice if he kept flying straight); Administrator v. Holstein, NTSB Order No. EA-2782 (1988) (ATC did not question pilot's erroneous acknowledgement of takeoff clearance for another aircraft with similar call sign); and Administrator v. Gabour, NTSB Order No. EA-4118 (1994) (ambiguous and improperly phrased taxi instruction precipitated pilot's runway incursion).

Another line of cases stands for the proposition that some forms of ATC malfeasance, while not exonerating, will justify mitigation or elimination of sanction. See, e.g., Administrator v. Ryan, 1 NTSB 1439 (1972); Administrator v. Alvord, 1 NTSB 1657 (1972); Administrator v. Snead, 2 NTSB 262 (1973); Administrator v. Nelson and Keegan, 2 NTSB 1900 (1975); Administrator v. Dunkel, 2 NTSB 2250 (1976); Administrator v. Swafford and Coleman, NTSB Order No. EA-4117 (1994). However, these cases are not helpful to respondent, since sanction is not at issue in this case in light of his immunity under the ASRP.

closely to ATC transmissions. As we said in Administrator v. McIntosh and Spriggs, NTSB Order No. EA-4174 at 5-6 (1994):

We have often emphasized that the pilot-in-command of a passenger-carrying flight in air transportation is held to the highest degree of care. [Footnote omitted.] Consistent with this high degree of care, it is not unreasonable to expect such a pilot to appropriately prioritize, and fulfill, competing duties.

Nor can we agree that the phraseology of the subsequently-issued traffic advisory was confusing in any way that would excuse respondent's misunderstanding. Respondent conceded at the hearing that its meaning was clear, and that he probably misunderstood it because he was "busy." (Tr. 138, 145.) We agree with the Administrator that this case is like Administrator v. Swafford and Coleman, NTSB Order No. EA-4117 (1994), in that a clear and unambiguous ATC instruction was not the precipitating cause of this incident. Rather, as in Swafford, the precipitating factor in this case was respondent's failure to understand a clear transmission, followed by -- despite respondent's claims to the contrary (discussed below) -- an uninformative readback.

Respondent asserts that his misunderstanding of the advisory should be excused because he gave a full readback of the perceived clearance, thereby discharging his duty under our case law to do all he could to expose the error.<sup>11</sup> He argues that the

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<sup>11</sup> Our precedent holds that, "even if a deviation from a clearance is initiated by an inadvertent mistake on the pilot's part, that mistake will be excused and no violation will be found if, after the mistake, the pilot takes action that, but for ATC, would have exposed the error and allowed for it to be corrected."



controller's acceptance of a click as an acknowledgement, without verification of its source, was improper, and that if the controller had complied with the requirement in the ATC handbook to "ensure acknowledgement by the pilot" of all clearances, instructions and information (see Exhibit R-2), the error would have been exposed and corrected, and no violation would have occurred.

Contrary to respondent's argument, the record in this case does not support a finding that respondent took appropriate action to expose his error. The law judge's decision contains no explicit credibility finding regarding respondent's claim that he gave a full readback of the perceived 17,000-foot clearance. However, we think the law judge's careful phrasing of the issue reveals some doubt as to whether it occurred (" . . . if such acknowledgement occurred, [it is unfortunate] that it wasn't received" (Tr. 282)). Indeed, the law judge proceeded to note that respondent had failed to acknowledge with a readback ATC's subsequent reiteration of his 16,000-foot clearance (Tr. 282-83), lending some support to the notion that respondent may also have failed to fully acknowledge the perceived 17,000-foot clearance.

However, even assuming that respondent attempted a complete read back, we think the most favorable inference that can be drawn from this record is that it was not heard by FAA because, as respondent himself suggested, he failed to properly depress

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Administrator v. Atkins and Richards, NTSB Order No. EA-4078 at 5 (1994), citing, Administrator v. Frohmuth and Dworak, NTSB Order No. EA-3816 (1993).

the microphone button.<sup>12</sup> No other plausible explanation for ATC's non-receipt of the readback was offered. As noted above, there is no evidence of any equipment malfunction. In these circumstances, respondent should not be extended the benefit of dismissal of the charges.

Nor can we agree that the controller's acceptance of a microphone click or quick "roger" as an acknowledgement of his advisory was improper to an extent that would excuse this violation. The preponderance of the evidence indicates that abbreviated acknowledgments of this sort are often used by pilots, and accepted by ATC, in response to courtesy information, even though it is not in strict compliance with guidance in the Airman's Information Manual stating that pilots should acknowledge all ATC transmissions with their call sign (Exhibit A-5), or in the ATC handbook stating that controllers should insure acknowledgement of all transmissions by the pilot (Exhibit R-2). Moreover, respondent's position that the controller failed to insure an acknowledgement from him is further weakened by respondent's confirmation that he was in fact the source of the transmission containing the click in response to the advisory.

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<sup>12</sup> In attempting to explain why his readback was not audible on the tape, respondent admitted that his "finger could have slipped off the mike button." (Tr. 154-55.) Indeed, respondent described himself during the relevant time period as having his "head down," and "holding the microphone at this position, digging for charts." (Tr. 137.) It is not clear from the written transcript exactly what position respondent may have been indicating, but the fact that he was "digging for charts" suggests that he was in an awkward posture for properly operating the microphone.

(Tr. 153.)<sup>13</sup>

Thus, the record in this case indicates that respondent either did not give the claimed readback or, if he did, failed to insure that it was properly transmitted. In either case, he failed to do all he could to expose his error in misunderstanding the advisory. In sum, we hold that ATC did not contribute to this incident in any way that warrants dismissal of the charges.<sup>14</sup>

Respondent makes two additional arguments, neither of which is persuasive. First, he argues that he reasonably relied on his first officer's confirmation, pursuant to company procedures, that they had been cleared to 17,000 feet. However, the reliance defense is not available under these circumstances, since respondent was the pilot whose original duty it was to handle and receive ATC radio communications.<sup>15</sup> See Administrator v. Deback, NTSB Order No. EA-3843 at 6-7 (1993). It is of no relevance that

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<sup>13</sup> Accordingly, the controller may reasonably have concluded that, by giving an abbreviated readback, respondent chose to assume the risk of having misapprehended the transmission. See Administrator v. Hinkle and Foster, 5 NTSB 2423, 2426 (1987); Administrator v. Smead and Hahn, NTSB Order No. EA-4021 at 5 (1993).

<sup>14</sup> We do not address the issue of whether ATC's role in this incident would have warranted a mitigation or elimination of sanction (see case law cited in footnote 10), as sanction has already been waived pursuant to the ASRP.

<sup>15</sup> We have summarized our reliance doctrine as follows: if 1) a particular task is the responsibility of another; 2) the relying pilot has no independent obligation or ability to ascertain the information; and 3) the relying pilot has no reason to question the other's performance, then and only then will no violation be found. Administrator v. Fay and Takacs, NTSB Order No. EA-3501 at 9 (1992).

the first officer may have had an independent "duty" to confirm respondent's understanding of the clearance. Nor does Administrator v. Krueger, NTSB Order No. EA-4302 (1994), cited in respondent's post-briefing "Citation to Supplemental Authority,"<sup>16</sup> support respondent's claimed entitlement to the reliance defense because, unlike respondent in this case, the relying pilot in that case had no responsibility to accomplish the task there at issue.

Finally, respondent argues that the section 91.13(a) violation is not supported because no imminent (i.e., actual) danger was caused by respondent's deviation. However it is well-established that only potential danger is necessary to establish a violation of section 91.13(a). Moreover, our precedent makes clear that an operational violation such as the one here at issue (91.123(a)) is sufficient to support a finding of a residual or

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<sup>16</sup> The Administrator has filed a motion to strike what he perceives to be "argument" in respondent's supplemental filing. He suggests that everything beyond the citation itself is unauthorized under our new rule, 49 C.F.R. 821.48(e), which permits citations to supplemental authorities to identify new, relevant decisions, but prohibits the use of such a filing to respond to a reply or to present argument. Our rule, however, is based on Federal Rule of Appellate Procedure 28(j), which permits a statement of reasons for the supplemental citations. Although respondent's two-and-a-half-page filing probably contains some (impermissible) argument along with the (permissible) statement of reasons, we are more concerned that respondent seems to have used the post-brief filing primarily as a vehicle for submitting a citation to, and presenting argument related to, an earlier case (Administrator v. Fay and Takacs, NTSB Order No. EA-3501 (1992)), which could have been, but was not, included in respondent's appeal brief. This is inappropriate. Accordingly, to the extent that respondent's supplemental filing goes beyond what is authorized by our rule, the Administrator's motion to strike is granted.

derivative section 91.13(a) violation. Administrator v. Fox,  
NTSB Order No. EA-4076 at 9 (1994).

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied; and
2. The initial decision is affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, and HAMMERSCHMIDT, Member  
of the Board, concurred in the above opinion and order.